Supreme Court of the United States

October Term, 1973

No. 73-932

ADULT BOOK STORE; MANAGER, ADULT BOOK STORE; STAG'S BOOK STORE; OWNER, RICHARD E. BLAIR; UNION CIGAR STORE; OWNER, BERT GERON,

Petitioners,

vs.

STATE OF OHIO, ex rel., M. E. SENSENBRENNER, MAYOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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December, 1973

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Supreme Court of the United States

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Petitioners,

vs.

STATE OF OHIO, ex rel., M. E. SENSENBRENNER, MAYOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled case on September 26, 1973.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio was entered on remand from this Court pursuant to order entered in *Adult Book Store v. Sensenbrenner,* 93 S. Ct. 3035 (1973).[1] The Opinion of the Supreme Court of Ohio is

[1] This Court's order is reproduced in the Appendix to this Petition as Appendix I.

reported at 35 Ohio St. 2d 220 (1973), and is reproduced in the Appendix to this Petition as Appendix J. The order of the Supreme Court of Ohio is unreported, but reproduced in the Appendix to the Petition as Appendix K.

The opinion of the Common Pleas Court is unreported, but reproduced in the Appendix to the Petition as Appendix E. The Opinion of the Court of Appeals is reported at 26 Ohio App. 2d 183 (1971) and is reproduced in the Appendix to the Petition as Appendix G. The first Order of the Supreme Court of Ohio entered on September 15, 1971, is unreported, but reproduced in the Appendix to the Petition as Appendix H.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether Sections 2905.34 and 2905.35 of the Ohio Revised Code, which purport to define and proscribe the production or dissemination of obscene material and Section 2905.37 of the Ohio Revised Code, which confers jurisdiction upon the Common Pleas Court to enjoin the sale, distribution, or presentation of obscene material, as defined in Section 2905.34, are violative of the protection accorded petitioners under the First Amendment to the Constitution of the United States.

2. Whether the 127 magazines in issue are obscene materials, the distribution and sale of which are not guaranteed and protected by the First Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of Ohio Revised Code Sections 2905.34, 2905.35 and 2905.37 are set forth in Appendix L hereto.

STATEMENT OF THE CASE

Petitioners, Adult Book Store; Manager, Adult Book Store; Stag's Book Store; Owner, Richard A. Blair; Union Cigar Store; and Owner, Bert Nixon, were named as Respondents in a civil Complaint, a copy of which is annexed hereto as Appendix A, filed by M. E. Sensenbrenner in his capacity as Mayor of the City of Columbus on May 13, 1970 in the Common Pleas Court of Franklin County, Ohio under the provisions of Ohio Revised Code 2905.34(3)[2] seeking *inter alia* to enjoin Respondents below from the further sale and possession of approximately 400 magazines and newspapers. On June 4, 1970, M. E. Sensenbrenner, in his capacity as Mayor of the City of Columbus, Ohio, filed an Amended Petition in the same cause, a copy of which is annexed hereto as Appendix B, seeking *inter alia* to enjoin the Respondents below from the further sale and possession of approximately 127 magazines, listed in the original Petition, the balance having been deleted due to inability to clearly define by title. On June 15, 1970, the Respondents filed their Joint Answer, a copy of which is annexed hereto as Appendix C, denying the allegations in Relator's Petition.

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[2] Ohio Revised Code Section 2905.34(3) was repealed September 15, 1970, subsequent to the trial. The judgment sought to be reviewed upon Writ of Certiorari was predicated upon present Ohio Revised Code Sections 2905.34, 2905.35 and 2905.37.

The cause came on for a trial on the merits before the Honorable Charles R. Petree commencing June 16, 1970.

The testimony established that Petitioners, their servants, agents and employees were engaged in the dissemination of publications in "adults only" bookstores. The entrances and outsides of the stores are unobtrusive and merely advertise that the stores are for adults only and no minors were permitted. All of the stores have exteriors making it impossible to see the interior of the establishments. No evidence was adduced by the moving party that Petitioners sold or offered for sale to a minor or an unwilling purchaser, nor that they thrust the materials upon anyone.

On August 3, 1970, Judge Petree rendered a decision, a copy of which is annexed hereto as Appendix E, finding that all 127 magazines in issue were obscene, lascivious, filthy and indecent, and rendered an order stating that they could not be offered for sale within the City of Columbus, Ohio to adults or children, that a permanent injunction should issue against any and all Respondents named, and that the Sheriff of Franklin County was to take possession of all exhibits mentioned and to destroy them as provided in since repealed Section 2905.34(3) of the Revised Code of Ohio in that said exhibits were not protected by the Constitution of the United States nor decisions of The United States Supreme Court.

The Petitioners appealed the decision of Judge Petree to the Court of Appeals of Franklin County, Ohio, which affirmed the Common Pleas Court decision. A copy of the opinion is annexed hereto as Appendix G.

The Petitioners filed an application with the Supreme Court of Ohio for leave to appeal the decision of the Court of Appeals affirming the decision and order of the Common Pleas Court. The application for leave to appeal,

docketed as Case No. 71-231, was filed on April 9, 1971. On order of the Supreme Court of the State of Ohio, the application for leave to appeal was denied on September 15, 1971, stating that "the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists." A copy of the dismissal order of the Supreme Court of Ohio is annexed hereto as Appendix H.

Thereafter, petitioners filed their petition for a Writ of Certiorari in this Court, which, on June 25, 1973, granted the petition and remanded the case for further consideration in light of *Miller v. California*, —— U.S.——, 93 S. Ct. 2607 (1973), and the companion cases decided by this Court on June 21, 1973. On remand, the Supreme Court of Ohio decided the case at bar simultaneously with *State, ex rel, Keating v. Vixen*, 35 Ohio St. 2d 215 (1973), which had also been remanded[3] by this Court for further consideration in light of *Miller v. California, supra*, and determined that Ohio Revised Code Sections 2905.34 and 2905.35 "comport with the standards for determining obscenity enunciated in *Miller v. California.*" 35 Ohio St. 2d at 221. After so determining that the statutes were constitutionally sound, the Supreme Court of Ohio applied the statutes to decide the case even though neither these statutes, nor the standards announced in *Miller v. California, supra*, were in existence at the time the case was tried. The Ohio Supreme Court merely stated that "if" the case were remanded to the trial court and retried under the new statutes, together with the application of the *Miller* standards, the result would be the same, for which reason the judgment of the lower court was affirmed. *Id.*

This Court has held that where the highest state court has considered and ruled upon federal questions in reach-

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[3] *Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating*, ——U.S.——, 93 S. Ct. 3033 (1973).

ing the judgment for which review is sought upon petition for a writ of certiorari, the Court will assume that the federal issues have been properly raised. *Louisville & Nashville R. Co. v. Higdon,* 234 U.S. 592 (1914).

REASONS FOR GRANTING THE WRIT

1. Ohio Revised Code Sections 2905.34 and 2905.35 Are Unconstitutional.

Respondent's amended petition sought to enjoin the sale of alleged obscene material. Both the statute upon which relief was sought, Ohio Revised Code Section 2905.343, and the statute prohibiting the sale of obscene material, Ohio Revised Code Section 2905.34, were repealed subsequent to the trial. However, in reaching their decisions the Franklin County Court of Appeals and the Supreme Court of Ohio, on remand, applied the successor statutes to-wit: Ohio Revised Code Sections 2905.34, 2905.35 and 2905.37, presently in force in Ohio, to sustain the judgment of the trial court.

Petitioners contend that these statutes, Ohio Revised Code Sections 2905.34 and 2905.35, are unconstitutional.

Ohio Revised Code Section 2905.37(A), under whose civil authority the proceedings below were upheld, reads in pertinent part as follows:

> "*Where it appears that section . . . 2905.35 of the Revised Code is being or is about to be violated,* the . . . [mayor] . . . may maintain an action in the common pleas court to enjoin the sale [or] distribution . . . of the *obscene material* . . ." (Emphasis and bracketed material added).

Section 2905.35, its criminal counterpart, prohibits, *inter alia,* the sale of *obscene materials,* and both sections rely upon Section 2905.34 for definitions of statutory terms,

including its statutory definition of *obscene material.* It is therefore readily apparent that if the definition section is subject to successful constitutional attack, the entire statutory scheme, including the statutory authority for the proceedings below, must fall.

Let us, then, take a look at Section 2905.34. It defines as obscene, material to which "when considered as a whole and judged with reference to ordinary adults, *any* of [four enumerated criteria] apply." Listing these criteria, the Statute notes that the material is obscene if "*its dominant appeal is to prurient interest,*" *id.* section (A) (1), *its dominant tendency is to arouse lust,* either by "depicting nudity, sexual excitement or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite," *id.* section (A) (2), or by "depicting bestiality or extreme or bizarre violence, cruelty, or brutality," *id.* section (A) (3), or where the "cumulative effect" of a series of displays of any of the foregoing is "*a dominant tendency to appeal to prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation . . .," *id.*, section (A) (4).

The statute defines "nudity" as the representation of "human male or female genitals, pubic area or buttocks" or a female breast "below the top of the nipple" with less than a full opaque covering, or "covered male genitals in a discernible turgid state." *Id.*, section (B). It defines "sexual conduct" as "masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast." *Id.*, section (D).

Thus, by its express language, the statute reaches, and prohibits, portrayal of the "nudity" of a fully clothed male and the "sexual conduct" of physical contact with

the fully clothed female breast in any publication, picture or film, provided the requisite dominant prurient appeal is shown.

Petitioners contend that Section 2905.34 is, on its face, constitutionally infirm for (A) overbreadth and (B) vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution, and that the entire statutory scheme based upon the definitions contained in that section is, for that reason, vulnerable to constitutional attack as well.

A. The Statute Is Void for Overbreadth.

It is well established that governmental legislative regulation of activity affecting First Amendment rights may not be accomplished "by means which sweep unnecessarily broadly". *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307

(1964).

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

For,

"[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

And see *Aptheker v. Secretary of State*, 378 U.S. 500, 508-509 (1964); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604, 608-610 (1967); *Louisiana ex rel. Gremillion v.*

N.A.A.C.P., 366 U.S. 293 (1961). Nor need one who attacks legislation for overbreadth demonstrate that his own conduct could not have been regulated by a law drawn with appropriately narrow specificity. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433 (1963).

Section 2905.34 (A) prohibits nudity and/or sexual conduct if its dominant appeal is to prurient interest or its dominant tendency is to arouse lust.

When this Court in *Roth v. United States*, 354 U.S. 476 (1957), excluded obscenity from the area of constitutionally protected expression, it was careful to delineate the narrow limits of its ruling. *Id.* at 488. It hastened to point out that "[s]ex and obscenity are not synonymous", *id.* at 487, and underscored the obvious fact that sex "is one of the vital problems of human interest and public concern." *Ibid.* Consistent with that concern, the Court has held many times since that publications containing nothing but nudes, whose dominant appeal is unmistakeably prurient and lustful, are constitutionally protected. e.g., *Austin v. Kentucky*, 386 U.S. 767 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Central Magazine Sales v. United States*, 389 U.S. 50 (1967); *Chance v. California*, 389 U.S. 89 (1967); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Burgin v. South Carolina*, 404 U.S. 806 (1971). The overbreadth of this aspect of the statute is apparent. Moreover, the statutory definition sweeps far more broadly in classifying material as obscence than the most recent decision of this Court permits.

In its most recent pronouncement, *Miller v. California*, ——U.S.——, 93 S. Ct. 2607 (1973), this Court has made

it clear that before publications may be prohibited, the material must be obscene, and it is obscene if, and only if, the trier of fact resolves all three of the following elements in the affirmative:

(a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 2615.

A careful reading of Ohio Revised Code Sections 2905.34 and 2905.35, upon which the judgment below was affirmed, reveals imprecise reference to the first of the criteria and total omission of the other two.

First: Although reference to appeal to prurient interest does appear in the statutory language, there is no statutory requirement that such appeal be based upon the application of contemporary community standards, as required by the *Miller* formula. Ohio Revised Code Section 2905.34(A). Moreover, it equates the arousal of lust with prurient interest. *Id* at (A) (2) and (A)(3).

Second: There is not even a passing statutory reference to the requirement that sexual subjects be portrayed "in a patently offensive way." Even if portrayal "in a way which tends to represent human beings as mere objects of sexual appetite", *id.* at (A) (4), could somehow be equated with patent offensiveness (a thesis which petitioners deny), it is apparent that the statuory scheme permits judgment for respondent upon proof of any of the four enumerated criteria. Thus, proof of Section (A)(1), which refers to nothing remotely resembling patent of-

fensiveness is sufficient, under the statutory scheme, to sustain the judgment for injunctive relief.

Third: There is no statutory statement that an essential element of proof of obscenity under the statute is that it "lacks serious literary, artistic, political or scientific value." The only reference to "a genuine scientific, educational, sociological, moral or artistic purpose" is limited to *one* of four alternative means of conviction, *id.* at (A)(4); it is apparent from the face of the statute that injunctive relief without such proof is available by any one of three alternative routes. Nor can the *Miller* criteria be met by reference to Ohio Revised Code Section 2905.38(C), which permits as an *affirmative defense,* proof of *dissemination* for a proper purpose by or to a proper person. For under *Miller* this Court made no attempt to saddle a party with the burden of proving one of the essential elements of the charge. Nor does the *Miller* formula require proof of dissemination for a proper purpose; rather, it compels a governmental showing that it intrinsically lacks such serious value.

Consistent with the admonition in *Miller* that "State statutes designed to regulate obscenity must be carefully limited", 93 S. Ct. at 2614, the statutes here involved must be struck down as constitutionally infirm for overbreadth.

B. The Statute Is Void for Vagueness.

Quite apart from the broad sweep of the statute, petitioners contend that its language is so imprecise, "so vague, the language so loose, as to leave to those who have to apply it too wide discretion", *Kingsley Int'l Pictures Corp. v. Regents,* 360 U.S. 684, 694 (1959). See *N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963); and see Amsterdam, Note, *The Void-for Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 90 (1960).

In a number of instances, this Court has voided attempts to establish vague and indefinite legislative standards to separate protected from prohibited books and films. *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) ("immoral" or "tend to corrupt morals"); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) ("approve . . . moral and proper [films]"); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 64 (1959) ("desirable, acceptable or proper"); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (portrayal of sexual promiscuity as "profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted"). And see *Winters v. New York*, 333 U.S. 507 (1948); *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954). The evil of such imprecise statutory drafting is, of course, that the would-be censor is set "adrift upon a boundless sea", *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952), because "what may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching". *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968).

The instant statute is replete with ambiguities and moral judgments which compound the vice of vagueness. E.g., "tendency to arouse lust". Sections (A)(2) and (A)(3), "in a way which tends to represent human beings as mere objects of sexual appetite", Section (A)(2), "extreme or bizarre violence, cruelty or brutality," Sections (A)(3) and (A)(4), appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose", Section (A)(4).

These are some examples of the ambiguous, value-judgment language which pock-mark the statute. They

give ample opportunity to those who have the power to initiate criminal prosecutions or to enjoin the sale or distribution of material to impose their own social values, moral judgments and notions about how our citizenry should behave in a society in flux. For, as former Justice Frankfurter once noted in another context, "where one comes out" on such matters "depends upon where one goes in. . . .". *Rabinowitz v. United States,* 339 U.S. 56, 60 (1950).

Any criminal statute which is so vague that men of common intelligence, experience and understanding must necessarily guess as to its meaning and differ as to its application violates the provisions of both the Fifth and Fourteenth Amendments. *Musser v. Utah,* 333 U.S. 95 (1948). But legislation limiting freedom of expression which fails to give fair notice of what acts will be punished violates the First Amendment as well. *Winters v. New York,* 333 U.S. 507, 510 (1948).

Acknowledging "the inherent dangers of undertaking to regulate any form of expression", this Court in *Miller* warned that "state statutes designed to regulate obscene materials must be carefully limited." Works which depict or describe sexual conduct may be prohibited only if that conduct is "*specifically defined* by the applicable state law, as written or authoritatively construed." 93 S. Ct. at 2615 (Emphasis supplied) *Accord: Paris Adult Theater v. Slayton,* —— U.S. ——, 93 S. Ct. 2628, 2642 (1973).

The statutes in the instant case clearly suffer from this constitutional defect.

2. The Materials in Issue are Protected by the First Amendment to the Constitution of the United States.

Petitioners contend that the materials in issue are not obscene and therefore are subject to the guarantee of free expression under the First Amendment.

This Court has stated that the materials claiming First Amendment protection are entitled to an "independent review". *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964). If the materials were accorded such independent review by the Court, consistent with the standards established in *Miller v. California, supra*, rather than the impermissible standards used by the Supreme Court of Ohio, they would be found not to be obscene.

CONCLUSION

The Supreme Court of Ohio has judicially approved state statutes which fail to meet the constitutional requirements established by this Court for the proscription of materials claiming First Amendment protection. Moreover, the materials themselves are not obscene under the standards established in *Miller v. California, supra.*

Petitioners urge the Court to grant their petition for a Writ of Certiorari to review the statutes which the Supreme Court of Ohio has ruled shall govern the dissemination of "any book, pamphlet, ballad, printed paper, phonograph record or tape, motion picture film, print, picture, figure [or] image",[4] to all persons throughout the state. This Court must find that the statutes infringe upon the rights of petitioners and the people of Ohio.

Respectfully submitted,

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December, 1973

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[4] Ohio Revised Code Section 2905.34 (E).

SUPREME COURT, U. S.

DEC 24 1973

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

No. 73-982

ADULT BOOK STORE; MANAGER, ADULT BOOK STORE; STAG'S BOOK STORE; OWNER, RICHARD A. BLAIR; UNION CIGAR STORE; OWNER, BERT NIXON,

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STATE OF OHIO, ex rel., M. E. SENSENBRENNER, MAYOR,

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To the Supreme Court of the State of Ohio

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APPENDIX A

Petition filed in Common Pleas Court

(Filed May 13, 1970)

Case No. 240419

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

State of Ohio, ex rel., M. E. Sensenbrenner, Mayor
Columbus, Ohio,
Relator,

vs.

Adult Book Store, 46 E. Rich St., Columbus, Ohio 43215, Robert L. Cannon, Manager, Adult Book Store, 46 E. Rich St., Columbus, Ohio 43215, Book Store, 1646 N. High St., Columbus, Ohio 43201, George K. Jacobs, Manager, Book Store, 1646 N. High St., Columbus, Ohio 43201, Union Cigar Store, Union Station, 385 N. High Street, Columbus, Ohio 43215, Bert Nixon, Owner, Union Cigar Store, 385 N. High St., Columbus, Ohio 43215, Mid-America Book Store, 14 E. Town St., Columbus, Ohio 43215 Kassam Migdadi, Owner, Mid-America Book Store, 14 E. Town St., Columbus, Ohio 43215, The Stag Bookstore, 185 N. High St., Columbus, Ohio 43215, Allen R. Blair, Owner, The Stag Bookstore, 185 N. High St., Columbus, Ohio 43215, South High St. Bookstore, 823 S. High St., Columbus, Ohio 43206, Phillip Jordan, Manager, South High Bookstore, 823 S. High St., Columbus, Ohio 43206, Gentleman's Bookstore, 183 S. High St., Columbus, Ohio 43206, James Plematis, Manager, Gentleman's Bookstore, 183 S. High St., Columbus, Ohio 43206, Buckeye News Service, 15 W. Spring St., Columbus, Ohio 43215, and Joseph J. Massell, Manager,

Buckeye News Service, 40 W. Long St., Columbus,
Ohio 43215,
Respondents.

PETITION

1. Now comes the relator, M. E. Sensenbrenner, and for his cause of action states that he is a duly elected Mayor for the City of Columbus, Ohio; that he is the chief executive officer of said municipal corporation; and that he brings this action pursuant to the provisions of Section 2905.343 of the Ohio Revised Code.

2. Relator further says that said respondents are either bookstores or owners or managers of bookstores that are located in the City of Columbus, Ohio; that said respondents sell, offer for sale, and have in their possession with the intent to sell books, magazines and films, which said relator, in his capacity as chief executive officer, believes to be obscene, lewd, lascivious, filthy and indecent; said books, magazines and films have pictures of nude men and women in various positions focusing on the genital area, and depicting acts of sexual intercourse and sodomy; said magazines being commercially exploited for the sake of prurient appeal, to the exclusion of all other values, to-wit:

All Stars
Above and Beyond
Astro-Sex
Affare
A Study of Voyerism
All 69 Nudies
Artist Models
Amateur T'Bird

Ambroshure
Artist Model Annual
Adult Movies
A Case of Lesbian Practices
Awake Naked
After Hours
Arcadia

Bunny
Bobcats
Boy Friend
Break-Thru
Breezy

Bottom
Babes
Beaver Colorama
Belly-Button
Bang

Boys and Buns
Big Boy
Backus
Body Shop
Bizzare Films
Black Silk Stockings
Black is Beautiful
Brood Tails
Break Through
Blazing Films
Baal

Bit of Beaut
Body & Soul
Boyology
Brothers
Busy Body
Boys
Black & Blue
Beaver Colorama
Belles En Colour
Barracuda

Casbah
Cover Girl
Candy
Carla
Clit
Can-Can
Continental Cuties
Champayne
Cock Tale
Caliente
Calliope
Click
Cougar
Courtesan
Cutie
Coloroma in Color
Classic Line
Chicken

Candida
Caprice
Circle
Cinemates
Curry
Case History
Cinema Keyhole
Cuddles
Civet
Cherry
Cassandra
Cander
Cuddle-Up
Color Views
Cala Rama
Cest La Vie
Cheetah
Campus Jay Bird

Dingle Dangle 3
Diana
Debs
Double Header
Delight
Deliah
Daring Films
Duo

Donny
Domino
Deuce
Dom's Boys
Duit
Diamond Stud
Dahlings

Exciting
Eyeopener's
Edie
Eve
Erotique
Electra
Exotic Cinema
Erotic

Ecstasy
Elinir
Eve's Rib
Eye
End in Sight
Eclipse
Erotic Cinema
Exposure & Design

Flower Children
Female Nudes
Fluff
Focus
Flesh Fantasy
Fi Fi
Film and Figure
Flesh Tones

Film & Figure
Flirt
Film Fare
France
Four Seasons
Fun In The Sun
French Follies
French Frills

Gaia Girl & Golden Boy
Gypsy
Gay Studs
Gemini
Gretchen
Galery
Grand Prix
Gina
Gal Friday

Girl Friends
Golden Breed
Golden Garter
Group Variations
Grabbers
Gay Confessions
Galerie #16
Galarama

Hollywood Hustlers
Happy Time Mama
Harem
Hustler
Harlow
Honey
High-Jinks
Honey-Bun
Her Obscene Color

Helena
Hot Flicks
Heavenly Bodies
Her Oscob
Heads-Up
Hombre
Hera-Scope
His and Hers

Intimate Affairs
Intimate Hours
Ida

Ingenue
Italia
Intima

In Private
International Jay Bird
Ingunue

Iris
In and Its Nice

Joy
Joint Venture
Joynt
Jack in His Box
Jock
Jay Bird Photographer
Jay Bird Safari
Jay Bird Way
Jay Bird Scene
Jay Bird U.S.A.

Jaguar
Jiffy
Jill
231 Jaygirl Photo's
Jay Bird Journal
Jay Bird Happening
Jay Bird Galary
Jay Bird Era
Jay Bird Experience
Jay Bird Swinger

Kios
Kink
Kittens
Kave

Karen
Kindered Spirits
Kissy Boy

Lovely Ladies
Limbo
Lesbians of Sweden
Liberten #3
Lips in Hips
Love Date
Loving Couples
L-Affaire
Liason
Lovely Lady
Lion
Les Amour
Lady Luck
Lovers
Live
Lance

Libra
Living Dolls
Lady Finger
Lookers
Late Show
Lucia
Lori Lee
Lighten Lovers
LUV
Leopard
Les-Two
Lezo
Lasses and Glasses
Let It All Hang Out
Line and Form

Molly
Male Swingers
Mossy Miss

Male Lovers
My Boys
Match

Media
Monplasir
Maria
Ming
Missy
Mix-Matches
Muff
Mustang
Media
Michelle
More Boys
Mr. Groovey
Man's Favorite Past Time
Midnight
Movies
Mister Sun

Midnight Model
Mona-Lisa
Mitzi 3
Mona
Mighty Mixture
Male Figure Review
Mod Lovers
Mond Taurus
Modern Women
Models Scrap Book
Male Pix
Male Swinger
Metropolitan Jay Bird
Madames
Modern Age
Movie Rebels

Nude Fling
New Horizons
Naked Boy Hood
Nude Rebels
Naked Break-Out
Naked Femine
Naked Teens
Nude Adventure
Nude Epic
Nudist Vandage Point
Nemphreros
Nude Image
Nexus
Nudist Omnibus
Nude
Nite Out
Nude Lark
Nympheros
New Dawn

Nylon Jungle
Nudist Galaxie
Naked House Partys
New Directions
Naked Love
Naked Uprising
Nude Living
Nude Cruise
Nude Mood
Night Out
New Comers
Naked Greed
Nude Era
Nude Direction
Nudists Treasury
Naked Leizure
Nudist
Nudist Idea

Open House
Obedience
One Plus One

O'Boy
Orgy

Pinned
Peacock
Pandora
Panther
Pussy Willow
Pzazz
Psych It To Me
Pendelum
Pieces
Pretty Girl
Powder Puff
Playtime Teens
Please
Pixie
Penelope
Pussy Barber

Paula
Play Girl
Paired
Penelope
Pucker
Phyliss
Private Clubs
Peek
Private Stock
Playtime Pals
Pent House
Pouty
Psychedelic
Photo Field Trip
Personal Approach

Quickie

Rene
Roomate Wanted
Riveria Girls
Rascals
Raunchy
Rosa
Roulette

Rawhide Males
Rough Riders
Ruby
Rise
Roger
Ram
Royale Rod

Skin Films
Sexual Freedom
Sex Expose
Super Studs
Sin and Sigh
Secret Hours
Soul Mate
Swappers
Sun Buff
Sun Dusk
Scize
Secret Hours
Swinger Scene

Sapphol Sorroities
Sex Secreta

Stud Poker
Sybil
Spanking Sister
Strokes
Snap
Sun Counter
Swagger
Savage Sex
Sisters
Sunscope

Shangri-La
Switch
Sissys
Starlet
Special
Sensuious Cinema
Sybil
Signs of Love
Suzzette
Salute
Swap
Suck Em Up
Stingers

Safari
Sugar
Score
Sweet Lorraine
Skin Film
Suzie's Six
Sugar
Spot
Suburban Jay Bird
Sol 69 & 68
Smoochers
Suburban Swingers

Trigger
Two & Two
Tom Boy
The McCoys
Tom Cat
Touch
Titan
Tip to Bottom
Thrust
Tiger
The Wildcats
Toni
Touchables

Teenage Spanker
Tail Gate
Trade Mark
Tracy
Tigress
The Edwardians
Troy and His Friends
The Newleyweds
Trap
Target
The Nudist Idea
The Seeker
The Leg World Elmer Batters

Tartarus
Tease
Topaz

Teen Age Jay Bird
Timarcus
Thighs High

Unmasked
Up Close
Urban Jay Bird
Unicorn

Unmasked Now
Upon
Utopia Jay Bird

Venus
Vikings

Valentine
Veluptuous

We	Wild Confessions
Wonder Girl	Wild Couples
Whipped	Womans Home
Wild in the Streets	Jay Bird
	Week End Jay Bird

X-Films

Young Lords	Young Jaybird
Youth In Art	Horoscope 70
Young Chaps	Young Maverick
Young Nudists	Young Beavers

Za Za

21 38-26-34

4. Relator further says that he has exhausted all legal remedies in that the Columbus Police Department is presently enjoined from making arrests on said books, magazines, and films.

5. Wherefore, Relator prays for a temporary restraining order prohibiting the respondents from in any manner distributing or selling said books, magazines, and films pending the trial of the issues in this case, and for a determination by this Court that said material is obscene, and for a permanent injunction prohibiting the sale or further sale, the distribution or further distribution, and the acquisition and possession of said books, magazines, and films, and for an order of this Court requiring respondents to surrender said books, magazines, and films to the Sheriff of Franklin County for destruction, and such other and further relief as the Court may deem to be just and equitable under the law.

/s/ John C. Young
John C. Young, City Attorney

/s/ William J. Melvin
William J. Melvin
Chief Trial Attorney

/s/ Thomas H. Bainbridge
Thomas H. Bainbridge
Assistant City Attorney
Attorneys for Relator

(Verification omitted in printing)

APPENDIX B

Amended Petition

(Filed June 9, 1970)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

(Title omitted in printing)

1. Now comes the relator, M. E. Sensenbrenner, and for his cause of action states that he is a duly elected Mayor for the City of Columbus, Ohio; that he is the chief executive officer of said municipal corporation; and that he brings this action pursuant to the provisions of Section 2905.343 of the Ohio Revised Code.

2. Relator further says that said respondents are either bookstores or owners or managers of bookstores that are located in the City of Columbus, Ohio; that said respondents sell, offer for sale, and have in their possession with the intent to sell, books, magazines and films, which said relator, in his capacity as chief executive officer, believes to be obscene, lewd, lascivious, filthy and indecent; said books, magazines and films have pictures of nude men and women in various positions focusing on the genital area, and depicting acts of sexual intercourse and sodomy; said magazines being commercially exploited for the sake of prurient appeal, to the exclusion of all other values, to-wit:

Above and Beyond (N.D.)	All 69 Nudies (#1)
Astro-Sex (N.D.)	Artist Models (Vol. 1, #2)
Affare (#3)	Arcadia (#22)
Boy Friend (Vol. 2, #2)	Bottom (Vol. #3)
Boys and Buns (N.D.)	Babes (N.D.)

Big Boys (#9 and #10)
Backus (#8)
Bizzare Films (#7)
Black is Beautiful (#1)
Break Through (#5)
Bail (Special #3)

Belly-Button (Vol. 1, #1)
Bit of Beaut (N.D.)
Boyology (#2)
Brothers (#1)
Boys (#3)
Belles En Colour (#2 and #3)

Casbah (N.D.)
Cover Girl (N.D.)
Candy (N.D.) (Book)
Continental Cuties (N.D.)
Calliope (N.D.)
Cougar (N.D.)
Courtesan (Vol. 1, #1)
Cutie (#1)
Colorama In Color (#2)

Chicken (Vol. 1, #1)
Candida (N.D.)
Caprice (Vol. #1)
Circle (#2 & #1)
Cinemates (Vol. 1, #3)
Cuddles (N.D.)
Cherry (N.D.)
Cassandra (N.D.)
Color Views (Vol. 1, #6)

Diana (Issue #1)
Debs (N.D.)
Double Header (N.D.)
Delight (N.D.)
Deliah (#1)
Daring Films (Vol. 4, #6)

Duo (N.D.)
Donny (N.D.)
Domino (Vol. #1)
Dom's Boys (N.D.)
Duit (N.D.)

Exciting (N.D.)
Eyeopener's (N.D.)
Edie (N.D.)
Eve (#2)
Erotique (Vol. 1, #1)

Electra (Vol. #3)
Eve's Rib (Vol. 2, #1)
Eclipse (Vol. 1, #4)
Erotic Cinema (Vol. 1, #5)
Exposure & Design (#10)

Flower Children (N.D.)
Focus (N.D.)
Flesh Fantasy (Vol. 1, #2)
Fi Fi (#1)
Film and Figure (#18 & #13)
Film & Figure (Vol. 19)

Flirt (#1)
France (N.D.)
Four Seasons (Vol. 1, #6)
Fun In The Sun (Vol. 1, #1)
French Frills (Vol. 9, #1)

Gypsy (N.D.)
Gay Studs (Vol. 1, #2, Vol. 2, #1)

Gina (N.D.)
Gal Friday (N.D.)
Girl Friends (Vol. 2, #1)

Galery (#1)
Grand Prix (#1)

Harem (N.D.)
Hustler (N.D.)
Harlow (N.D.)

Intimate Hours (Vol. #1)

Joint Venture (#1 and #3)
Joynt (N.D.)
Jack In His Box (N.D.)
Jock (N.D.)
Jay Bird Photographer (#7 & #12)
Jay Bird Scene (#5)

Kind (N.D.)
Karen (N.D.)

Limbo (N.D.)
Lips In Hips (N.D.)
Love Date (#1)
Loving Couples (#1)
Liason (#3)
Lucia (N.D.)
Lori Lee (#2)
LUV (Vol. 1, #2 & # 10)

Molly (N.D.)
Mossy Miss (#1)
Male Lovers (N.D.)
Match (N.D.)

Mona-Lisa (N.D.)

Mightyy Mixture (N.D.)
Male Figure Review (#1)

Galerie (#16 & #5)
Galarama (#1 & #2)

Heads-Up (Vol. 2, #1)
Hera-Scope (N.D.)
His and Hers (#1)

Ida (N.D.)

Jaguar (N.D.)
Jiffy (N.D.)
Jay Bird Journal (#14)
Jay Bird Happening (N.D.)
Jay Bird Experience (#14)
Jay Bird Swinger (#1)

Kissy Boy (#3)

Lovely Lady (1)
Live (Vol. 1, #1)
Libra (N.D.)
Living Dolls (Vol. #1)
Lady Finger (#1)
Les-Two (#2)
Lezo (# and Vol. 1, #3)

Mod Lovers (#3)
Male Pix (#5)
Mr. Groovey (N.D.)
Mister Sun (Vol. 1, #10 & #9)
Midnight (Vol. 7, #4 - Vol. 9, #1)
Modern Age. (Vol. 1, #1)

New Horizons (Vol. 1, #3)
Nude Rebels (Vol. 2, #1)
Naked Break-Out (#2)
Naked Teens (#3)
Nude Epic (#5)
Nude Lark (#3 & #15)
Nympheros (#3 & #2)
Nude Image (#5)

New Dawn (Vol. 1, #7)
Nudist Galaxie (#10)
New Directions (#12, #17)
Nude Cruise (#1)
Nude Mood (N.D.)
Nude Era (Vol. 1, #3)
Nudist Idea (#15)

Open House (N.D.)
One Plus One (N.D.)

O'Boy (#4)

Peacock (N.D.)
Pandora (N.D.)
Pussy Willow (N.D.)
Psych It To Me (#4)
Pretty Girl (N.D.)
Powder Puff (N.D.)

Please (N.D.)
Pixie (N.D.)
Penelope (Issue #1)
Paula (#1)

Play Girl (N.D.)
Pucker (N.D.)
Phyliss (N.D.)
Peek (N.D.)
Private Stock (N.D.)
Pent House
(Vol. 1, Issue 2)
Psychedelic (N.D.)
Photo Field Trip (#26)
Personal Approach (N.D.)

Quickie (Vol. 7, #2)

Rene (#1)
Riveria Girls (Issue #1)
Raunchy (Vol. 1, #3)
Rawhide Males (N.D.)

Rough Riders (#1)
Rise (#1)
Ram (N.D.)

Skin Films (#1, Vol. 1, #1)
Sexual Freedom (N.D.)
Super Studs (Vol. 1, #1)
Soul Mate (#1)
Sun Buff (#8)
Swinger Scene (N.D.)
Shangri-La (N.D.)
Sybil (#1)
Spanking Sister
(Vol. 1, #4)

Score (#1)
Sybil (N.D.)
Signs of Love (#1)
Swap (Vol. 3, #1)
Stingers (Vol. 1, #2)
Sweet Lorraine (N.D.)
Skin Film (N.D.)
Suzie's Six (N.D.)
Sugar (N.D.)

Sisters (N.D.)
Safari (N.D.)

Trigger (#3)
Tom Boy (#2)
Titan (N.D.)
Thrust (#4)
Toni (N.D.)
Touchables (N.D.)

Tartarus (N.D.)
Topaz (Vol. 1, #1)
Teenage Spanker
(Vol. 1, #1.

Unmasked (N.D.)
Up Close (N.D.)

Venus (Vol. 2)

We (N.D.)

Young Lords (#1)
Youth In Art
(#4, #3, #2)

Za Za (N.D.)

Suburban Jay Bird (#1)
Suburban Swingers (#3)

Tracy (#1)
The Edwardians (N.D.)
Troy and His Friends (N.D.)
The Newleyweds (N.D.)
Target (N.D.)
The Seeker
(Vol. 1, #3, #4)
Teen Age Jay Bird (#4)
Timarcus (#1)
Thighs High (N.D.)

Unicorn (#1 & #2)
Upon (#1)

Valentine (Special Ed.)

Week End Jay Bird
(#19 & #14)

Young Nudists (#15)
Young Beavers
(Vol. 4, #2 - Vol. 2, #6)

* N.D. = No Description

This means no volume number, date of issuance or publisher's name could be found on the copies.

3. Relator further says that he has exhausted all legal remedies in that the Columbus Police Department is presently enjoined from making arrests on said books, magazines, and films.

4. Wherefore, Relator prays for a temporary restraining order prohibiting the respondents from in any manner distributing or selling said books, magazines, and films pending the trial of the issues in this case, and for a determination by this Court that said material is obscene, and for a permanent injunction prohibiting the sale or further sale, the distribution or further distribution, and the acquisition and possession of said books, magazines, and films, and for an order of this Court requiring respondents to surrender said books, magazines, and films to the Sheriff of Franklin County for destruction, and such other and further relief as the Court may deem to be just and equitable under the law.

John C. Young, City Attorney
William J. Melvin
Chief Trial Attorney
Robert A. Cohen
Assistant City Attorney
Attorneys for Relator

(Verification omitted in printing)

APPENDIX C

Joint Answer of Adult Book Store, Robert L. Cannon, Manager, Adult Book Store, Book Store, George K. Jacobs, Manager, Book Store, Union Cigar Store, Bert Nixon, Owner, Union Cigar Store, The Stag Bookstore, Richard A. Blair, Owner, The Stag Bookstore, South High Street Bookstore, Phillip Fedele, Manager, South High Street Bookstore

(Filed June 15, 1970)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

(Title omitted in printing)

1. Respondents admit to the allegations in paragraph 1 of Relator's Petition.

2. Respondents deny each and every allegation in Relator's Petition except as stipulated by and between Relator and these Respondents in the Stipulation filed this date.

WHEREFORE, Respondents pray that Relator's Petition be dismissed and that they be permitted to go henceforth without costs.

/s/ Laurence E. Sturtz
Laurence E. Sturtz
Attorney for the 10 named Respondents

(Verification and Certificate of Service omitted in printing)

APPENDIX D

Judgment of Common Pleas Court

Case No. 240,419

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

State of Ohio, ex rel., M. E. Sensenbrenner, Mayor, Columbus, Ohio

Relator,

-vs-

Adult Book Store, et al.,

Respondents.

JUDGMENT

This cause came to be heard upon the relator's amended petition for a permanent injunction pursuant to Section 2905.343 of the Ohio Revised Code, to enjoin the sale and distribution of one hundred and twenty-seven magazines and books as obscene.

The Court being fully advised of the premises finds that said books and magazines described in the amended petition and marked as relator's Exhibits A-1 through A-18 inclusive; B-1 through B-5 inclusive; C-1 through C-20 inclusive; D-1 through D-4 inclusive; E-1 through E-18 inclusive; F-1 and F-2; G-1 through G-6 inclusive; H-1 through H-3 inclusive; I-1 through I-3 inclusive; J-1 through J-10 inclusive; K-1 and K-2; L-1 through L-7 inclusive; and R-1 through R-29 inclusive, are obscene, lascivious, filthy and indecent and may not be offered for sale within the City of Columbus, Ohio to adults or children, and that said exhibits are not protected by the Constitution of the United States and the decisions of the United States Supreme Court. The Court also finds that

relator is entitled to a permanent injunction against all respondents named herein enjoining them from offering any and all of said publications for sale in the City of Columbus, Ohio.

It is therefore ordered, adjudged and decreed that the relator's petition for a permanent injunction be, and is hereby granted.

It is further ordered that all of said exhibits be retained by the Court until final disposition of this matter on appeal.

Exceptions to respondents.

Charles R. Petree, Judge

APPENDIX E

Opinion of Common Pleas Court

(August 3, 1970)

No. 240419

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

State of Ohio, ex rel., M. E. Sensenbrenner, Mayor, Columbus, Ohio,

Relator,

vs.

Adult Book Store, *et al.*,

Respondents.

DECISION

Rendered this 3rd day of August, 1970. Petree, J.

This case seeking a permanent injunction, came on to be heard by the Court, without a jury, on the amended petition of the Relator the answers of the Respondents, the evidence and argument of counsel both oral and written.

The Court has considered the affidavit of Respondent Buckeye News Service and its manager filed June 15, 1970, prior to taking of testimony, counsel for Relator and counsel for certain of the Respondents entered into the following written stipulation:

> "It is hereby agreed between counsel for the relator and counsel for the following respondents; The Adult Book store, The Book Store, Stags Book Store, South High Street Book Store, Union Cigar Store, that reserving all objections to relevancy and materiality,

"1. M. E. Sensenbrenner is the duly elected Mayor for the City of Columbus, Ohio and he is the chief executive officer of said municipal corporation.

"2. For the purposes of the trial only, the magazines listed in the amended petition have been offered for sale within the City of Columbus, by some but not all of the book stores.

"3. All magazines listed in the amended petition will be marked and identified prior to the trial.

"4. The Adult Book Store, The Book Store, Stags Book Store, South High Book Store, and Union Cigar Store have blackened windows at all times herein relevant making it impossible for a person or persons on the street to see the material on display in the respective stores.

"5. The Adult Book Store, The Book Store, Stags Book Store, South High Street Book Store and The Union Cigar Store each have a sign posted on or about the door stating: 'You must be 21 to enter.'

"Stipulated by:

John C. Young, City Attorney
William J. Melvin
Chief Trial Attorney
Robert A. Cohen
Assistant City Attorney
Attorneys for the Relator
Laurence E. Sturtz
Attorney for The Adult Book
Store, The Book Store, Stags, Book Store, South High Street Book Store and Union Cigar Store, Respondents."

The amended petition filed June 4, 1970 alleged:

"1. Now comes the relator, M. E. Sensenbrenner, and for his cause of action states that he is a duly elected Mayor for the City of Columbus, Ohio; that

he is the chief executive officer of said municipal corporation; and that he brings this action pursuant to the provisions of Section 2905.343 of the Ohio Revised Code.

"2. Relator further says that said respondents are either bookstores or owners or managers of bookstores that are located in the City of Columbus, Ohio; that said respondents sell, offer for sale, and have in their possession with the intent to sell, books, magazines and films, which said relator, in his capacity as chief executive officer, believes to be obscene, lewd, lascivious, filthy and indecent; said books, magazines and films have pictures of nude men and women in various positions focusing on the genital area, and depicting acts of sexual intercourse and sodomy; said magazines being commercially exploited for the sake of prurient appeal, to the exclusion of all other values, to-wit:"

Then certain magazines or books are named.

"3. Relator further says that he has exhausted all legal remedies in that the Columbus Police Department is presently enjoined from making arrests on said books, magazines, and films.

"4. Wherefore, Relator prays for a temporary restraining order prohibiting the respondents from in any manner distributing or selling said books, magazines, and films pending the trial of the issues of this case, and for a determination by this Court that said material is obscene, and for a permanent injunction prohibiting the sale or further sale, the distribution or further distribution, and the acquisition and possession of said books, magazines and films, and for an order of this Court requiring respondents to surrender said books, magazines, and films to the Sheriff of Franklin County for destruction and such other and further relief as the Court may deem to be just and equitable under the law."

The joint answers filed June 15, 1970, of ten respondents represented by attorney Laurence E. Sturtz are essentially a general denial except that paragraph 1 is admitted.

The answer of respondent Kassam Migdadi is a general denial except it admits the relator is the chief executive officer of the City of Columbus.

Respondent, Gentleman's Bookstore alleges:

"1. Now comes the respondent, Gentleman's Book Store, by Richard Furry, Manager, and for his answer to the Relator's petition, admits that M. E. Sensenbrenner is the duly elected Mayor for the City of Columbus, Ohio, and that he is the chief executive officer of said municipal corporation; that respondents herein are bookstores in the City of Columbus and managers of bookstores in Columbus, Ohio and that respondents have in their possession with the intent to sell, books, magazines and films.

"2. Answering further, respondents Gentleman's Book Store and Richard Furry deny that the books, magazines and films in their possession are obscene, lewd, lascivious, filthy and indecent; that said books, magazine and films have pictures of nude men and women in various positions focusing on the genital area, and depicting acts of sexual intercourse and sodomy; respondents further deny that said magazines are being commercially exploited for the sake of appeal to prurient (sic) appeal, to the exclusion of all other values.

"Answering further, respondents say that the books, magazines and films in their possession are protected by the Constitution of the United States and decisions of the United States Supreme Court.

"Answering further, respondents deny each and singular every allegation in Relator's petition not specifically herein admitted to be true.

"WHEREFORE, Respondents pray that Relator's petition be dismissed at Relator's costs."

Pursuant to request of respondents that the Court make written findings of facts and conclusions of law, the Court finds the facts and law as follows:

FINDINGS OF FACT

That the magazines or books described in the petition and marked as relator's exhibit A 1 through A 18 inclusive, B 1 through B 5 inclusive, C 1 through C 20 inclusive, D 1 through D 4 inclusive, E 1 through E 18 inclusive, F 1 and F 2, G 1 through G 6 inclusive, H 1 through H 3 inclusive, I 1 through I 3 inclusive, J 1 through J 10 inclusive, K 1 and K 2, L 1 through L 7 inclusive, and R 1 through R 29 inclusive, are found by the court to be obscene, lascivious, filthy and indecent and are offensive to the general contemporary community within the United States. And the court further finds the dominant theme of all of these books and magazines marked as exhibits and taken as a whole appeals to a prurient interest in sex. And the material in each of these exhibits is utterly without redeeming social value.

The court further finds that all of the exhibits heretofore named were offered for sale by some but not all of the respondents. The court further finds that Relator Sensenbrenner is the Mayor of the City of Columbus and the chief executive officer of said Municipal Corporation. The court further finds that the windows of the Adult Book Store, the Book Store, the South High Book Store, Stags Book Store, and Union Cigar Store were blackened so that persons outside could not see inside and that said stores had a sign posted stating as follows: "You must be 21 to enter."

FINDINGS OF LAW

Based upon the above findings of facts that the above books described in the exhibits hereintofore set forth and found to be obscene, lascivious, filthy and indecent, may not be offered for sale within the City of Columbus, Ohio to adults or children, that relator is entitled to a permanent injunction against any and all respondents named herein and upon the final adjudication of this case the Sheriff of Franklin County will be empowered to take possession of all exhibits mentioned herein upon request of the relator, and destroy them as provided in Section 2904.343 of Revised Code of Ohio, and the above exhibits are not protected by the Constitution of the United States and decisions of the United States Supreme Court.

JUDGMENT for relator in accordance with the findings of fact and conclusions of law that have been set forth.

/s/ Charles R. Petree, Judge

APPENDIX F

Judgment of Court of Appeals of Franklin County

No. 9891

IN THE COURT OF APPEALS
TENTH DISTRICT
FRANKLIN COUNTY, OHIO

State of Ohio, ex rel., M. E. Sensenbrenner, Mayor,
Relator-Appellee,

vs.

Adult Book Store, et al.,
Respondents-Appellants.

JUDGMENT

This cause came on for hearing on appeal on questions of law from a judgment of the Franklin County Court of Common Pleas in an action pursuant to Section 2905.343 of the Ohio Revised Code enjoining the Appellants from selling or distributing 127 magazines and books which the trial court found to be obscene.

The Court being fully advised in the premises affirms the trial court's judgment for the reasons stated in its decision rendered on March 2, 1971.

It is therefore ordered, adjudged and decreed that the judgment of the Franklin County Court of Common Pleas be and is hereby affirmed.

Exceptions to the Appellants.

APPENDIX G

Opinion of Court of Appeals of Franklin County

THE STATE, EX REL, SENSENBRENNER, MAYOR, APPELLEE, *v.* ADULT BOOK STORE ET AL., APPELLANTS.

[Cite as State, EX REL. Sensenbrenner, v. Adult Book Store (1971), 26 Ohio App. 2d 183.]

Criminal law—Injunction against sale or distribution of obscene magazines — Obscenity — Test — Community standards — Determination — Redeeming social value, defined—Not available as defense, when—Pandering of obscenity—What constitutes—Evidence—"Medium core pornography"—Constitutes obscenity, when—Not constitutionally protected—Article XIV, Amendments, U. S. Constitution—Due process—R. C. 2905.343.

1. While the states, pursuant to the Fourteenth Amendment to the United States Constitution, have a broader power to restrict the freedom, or liberty, of speech and the press than the federal government has under the First Amendment, obscenity is not within the area of constitutionally protected freedom or liberty of speech and the press under either the First or Fourteenth Amendments.
2. No standard for testing what constitutes obscenity has been established by a majority of the United States Supreme Court, but there are several varying and conflicting standards applied to render judgments with one predominant minority view constituting the "balance" by which the outcome of cases is determined.
3. The "deciding-minority view" of the United States Supreme Court is that obscenity constitutes material as to which the following three elements exist and coalesce: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating

to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value.

4. Material appeals to a prurient interest in sex when it has a tendency to excite lustful thoughts or appeals to a shameful or morbid interest in nudity or sex. "Appeal to prurient interest in sex" is not limited to material which causes lustful acts (rather than only thoughts) or which causes action reprehensible to society. An appeal to voyeurism constitutes an appeal to a prurient interest in sex.

5. Material affronts contemporary community standards relating to the description or representation of sexual matters where the material affronts the standards of the average person of the national community. Neither the standards of the most permissive or liberal localities or segments of society, nor the standards of the most restrictive or conservative localities or segments of society constitute the national community standard. It is the *standard* of the national community, rather than the community itself that *must* be affronted, and such *standard* may be affronted even in the absence of evidence that any member of the community was or could have been personally affronted.

6. "Social value" resulting from the fact that material is obscene does not constitute redeeming social value. Redeeming social value is "social value" existing for some use or purpose other than obscenity but such social value may be present in material despite the fact that it contains all the attributes of obscenity.

7. Where material is offered for sale because it constitutes obscenity and for use as erotica through an appeal to the erotic interest of the purchaser, the existence of redeeming social value with respect to the use of the material for some other purpose (in a different context) is not available as a defense to such seller (or panderer).

8. Pandering of obscenity is the business of purveying pictorial or graphic matter openly advertised to appeal to the erotic interest of customers or potential customers by either blatant and explicit advertising or subtle and sophisticated advertising.

9. "Medium core pornography" as well as "hard core pornography" constitutes obscenity that is not within the area of constitutionally protected speech or press.

(No. 9891—Decided March 2, 1971.)

APPEAL: Court of Appeals for Franklin County.

Mr. John C. Young, city attorney, *Mr. William J. Melvin* and *Mr. Robert A. Cohen*, for appellee.

Mr. Laurence E. Sturtz and *Mr. Walter J. McNamara III*, for appellants Adult Book Store et al.

Mr. William E. Boyland, for appellants Mid-America Book Store et al.

WHITESIDE, J. This is an appeal from a judgment of the Franklin County Court of Common Pleas, in an action brought pursuant to R. C. 2905.343,* enjoining the appellants from selling or distributing 127 magazines and books which the trial court found to be obscene.

There has been much litigation in recent years concerned with the limitations upon the general police power of the respective states in the area of the regulation or prohibition of obscenity. Unfortunately, this litigation has not resulted in clearly-defined limitations upon the exercise of the police power regulating obscenity, but, rather, has rendered this area of the law most confusing and uncertain.

The United States Supreme Court has applied the First Amendment protections against the abridgement of

* Subsequent to this action in the Common Pleas Court, R. C. 2905.343 was repealed.

freedom of speech or of the press to the states through the Fourteenth Amendment to the United States Constitution, and, a majority of that court has consistently held that obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States* (1957), 354 U. S. 476.

There has been a general assumption that the First Amendment to the United States Constitution is directly applicable to the states. This is obviously not the case. The First Amendment reads in pertinent part that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." By its very language, the First Amendment has no further application than to prohibit Congress from making any law which abridges the freedom of speech or of the press. In *Roth*, the issue was stated as follows, at pages 479-80:

> "In Alberts, the primary constitutional question is whether the obscenity provisions of the California Penal Code invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment."

Section I of the Fourteenth Amendment of the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The only logical conclusion from a comparison of the First Amendment to the United States Constitution with

the Fourteenth Amendment is that Congress may make no laws whatsoever abridging the freedom of speech or press, whereas the states are prohibited from depriving any person of the liberty of speech or press without due process of law.

Far too often this distinction has been forgotten or ignored, and the same limitations placed upon state action under the Fourteenth Amendment as have been placed on federal action under the First Amendment. However, to apply the sweeping prohibition on the First Amendment to the states is to ignore the language of the Fourteenth Amendment, "without due process of law." In other words, to apply the sweeping prohibition of the First Amendment to the states, the Fourteenth Amendment must be read as merely stating; "nor shall any state deprive any person of the liberty of speech or press." However, the additional language contained in the Fourteenth Amendment, "without due process of law," cannot be ignored or rendered nugatory. In *Duncan v. Louisiana* (1968), 391 U. S. 145, the United States Supreme Court apparently recognized this distinction but did not comment further thereon since it was not an issue directly involved. The court stated at pages 147-148:

> "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects * * * the rights of speech, press, and religion covered by the First Amendment * * *."

There can be little quarrel with this statement that rights (or liberties) of speech, press, and religion covered by the First Amendment are protected against state action by the Fourteenth Amendment. However, in applying this principle, courts must remain mindful that such rights (or liberties) are protected from state action only to the extent that it deprives a person of rights (or liberties) without due process of law.

As noted above, the United States Supreme Court has held that obscenity is not included within the freedom of speech or of the press. In *Roth*, the Supreme Court did have before it the distinction between the First and Fourteenth Amendments, and rejected the argument, apparently because it was not necessary to be decided in view of the holding that obscenity is not expression protected by the First Amendment, and the judgment was that of affirmance. The court stated, in footnote 21 at page 492:

> "For the same reason, we reject, in this case, the argument that there is greater latitude for state action under the word 'liberty' under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment."

Even there, the court did not consider the words "without due process of law."

In any event, it would appear that this issue has not been squarely presented to the United States Supreme Court in any of the subsequent cases, for that court has not directly commented on the fact that there is greater latitude for state action under the Fourteenth Amendment than is allowed to Congress by the First Amendment.

Perhaps, the constitutional principles involved would be clearer, and more easily understood and applied by the courts, lawyers and laymen, if the courts and others would refrain from the illogical fiction of referring to the incor-

poration of the First Amendment into the Fourteenth Amendment and, instead, express the constitutional principle in is proper perspective that the liberties or freedoms guaranteed by the First Amendment are among the liberties protected by the Fourteenth Amendment. Under such circumstances, courts could clearly proceed to the determination of whether or not state action affecting First Amendment liberties was with or without due process of law, in accordance with the Fourteenth Amendment.

Furthermore, the Ohio Constitution, Section 11, Article I, also guarantees the freedom of speech and of the press and reads in pertinent part as follows:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

While the Ohio constitutional provision is probably more closely equated with the limitations of the Fourteenth Amendment than with those of the First Amendment to the United States Constitution, there is no necessity in this case to determine or to rely upon such differences. As noted above, the United States Supreme Court has clearly held that obscenity is not within the constitutionally protected freedom or liberty of speech or press. In *Stanley v. Georgia* (1969), 394 U. S. 557, 22 L. Ed. 2d 542, it is stated in the majority opinion at page 568 that:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad power to regulate obscenity * * *."

It is necessary, therefore, to examine what constitutes obscenity, which is not within the constitutionally protected liberty of speech and press. This task is made more difficult by the fact that there has been no clear standard

adopted by a majority of the United States Supreme Court. For several years following *Roth*, the United States Supreme Court cases in this area were almost without exception by a majority of the court agreeing to a judgment predicated on differing reasons and explained in concurring opinions.

In 1967, the United States Supreme Court apparently gave up any efforts to reconcile the varying views of the respective justices into a clear majority rule resorted to a per curiam handling of obscenity cases, indicating that regardless of which view was to be followed in individual cases the judgments would be the same. The dilemma confronting the United States is probably best expressed in a decision apparently adopting this policy. In *Redrup v. New York* (1967), 386 U. S. 767, 87 S. Ct. 1414, the court, at page 770, said:

> "Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control or punish the distribution of any writings or pictures upon the ground of their 'obscenity.' A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce,' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value.' *Memoirs v. Massachusetts*, 383 U.S. 413, 418-419. Another Justice has not viewed the 'social value' element as an

independent factor in the judgment of obscenity. *Id.*, at 460-462 (dissenting opinion).

"Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand."

Subsequent to the *Redrup* case, almost all obscenity cases before the United States Supreme Court have also been decided by *per curiam* decisions citing *Redrup* as the basis for the decision. In most instances, there are two, three or four judges dissenting from the judgment. Today, it would appear that there are at least two and probably three justices of the United States Supreme Court who dissent from the general tenor of the judgments of that court, and who would permit greater latitude in the regulation of obscenity than is permitted by the judgments of that court.

We appear not to have a consentaneous majority view of the United States Supreme Court to follow but, rather, appear to have what might be termed a "deciding-minority view," the application of which is dispositive of most of the cases presented to that court. This, of course, is the view expressed in *Roth, supra,* and elaborated upon in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* (1966), 383 U. S. 413, commonly referred to as *"Memoirs."*

A state court, when confronted with an obscenity question, may be tempted to adopt and apply the minority view which most closely adheres to the view of the state court. However, if a state court is to be realistic and desires to render a judgment which will probably be affirmed if appealed to the United States Supreme Court, it must endeavor to render a judgment in accordance with what we have referred to as the deciding-minority view. This we shall attempt to do in this case.

The deciding-minority view of the United States Supreme Court has been expressed most frequently in the opinions of Mr. Justice Brennan. In *Memoirs* (and *Redrup*), the key elements that coalesce to make material obscene were stated as follows: first, the dominant theme of the material taken as a whole appeals to a prurient interest in sex; second, the material is patently offensive because it affronts contemporary community standards relating to the description or representaion of sexual matters; and, third, the material is utterly without redeeming social value. Also to be considered, however, is the test set forth in *Ginzburg v. United States* (1966), 383 U. S. 463, and *Mishkin v. New York* (1966), 383 U. S. 502. In *Ginzburg*, the majority opinion states, at page 465:

> "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

The court further states, at page 467:

> "Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'"

The Court further says in this regard, at pages 474 and 475:

"Rather, the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.

"It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

We view *Ginzburg* and *Mishkin* primarily as limitations upon the application of the redeeming social value test. While material otherwise obscene, as stated in *Memoirs,* may not be proscribed entirely where it has a redeeming social value, when a person is exploiting material for its prurient appeal, such person is not entitled to rely upon the fact that in other contexts the material may have redeeming social value. Thus, the redeeming social value test is applicable only in those situations where the material itself is on trial or is being utilized for its redeeming social value. The opinion in *Memoirs* (383 U. S. 413) placed the issue in its proper perspective, at page 415, when it stated:

"This is an obscenity case in which Memoirs of a Woman of Pleasure (commonly known as Fanny Hill) written by John Cleland in about 1750, was adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor."

In the instant case, both the material and the distributors are "on trial."

State courts have had particular difficulty in attempting to apply the standards as announced in *Redrup.* This

is evinced by the fact that there have been numerous reversals of decisions in obscenity cases by short per curiam opinions merely citing *Redrup, e. g.: Keney v. New York* (1967), 388 U. S. 440; *Friedman v. New York* (1967), 388 U. S. 441; *Ratner v. California* (1967), 388 U. S. 442; *Cobert v. New York* (1967), 388 U. S. 443, *Sheperd v. New York* (1967), 388 U. S. 444; *Avansino v. New York* (1967), 388 U.S. 446; *Aday v. United States* (1967), 388 U. S. 447; *Books, Inc., v. United States* (1967), 388 U. S. 449; *A Quantity of Copies of Books v. Kansas* (1967), 388 U. S. 452; *Mazes v. Ohio* (1967), 388 U.S. 453; *Schackman v. California* (1967), 388 U. S. 454; *Potomac News Co. v. United States* (1967), 389 U. S. 47; *Conner v. City of Hammond* (1967), 389 U. S. 48; *Central Magazine Sales, Ltd., v. United States* (1967), 389 U. S. 50; *Chance v. California* (1967), 389 U. S. 89; *I. M. Amusement Corp. v. Ohio* (1968), 389 U. S. 573; *Robert Arthur Management Corp. v. Tennessee, ex rel. Canale, District Attorney General* (1968), 389 U. S. 578; *Felton v. City of Pensacola* (1968), 390 U. S. 340; *Henry v. Louisiana* (1968), 392 U. S. 655; *McMann v. Ross* (1969), 396 U. S. 118; *Cain v. Kentucky* (1970), 397 U. S. 319; *Bloss v. Dykena* (1970), 398 U. S. 278; *Walker v. Ohio* (1970), 398 U. S. 434; *Hoyt v. Minnesota* (1970), 399 U. S. 524.

Such *per curiam* decisions have, of course, afforded no clarification of the varying standards set forth in *Redrup*. Consequently, we must continue to attempt to follow the deciding-minority view as set forth above.

Three expert witnesses were called in the court below, one by the appellee and two by the appellants. The expressed opinions of the appellee's expert were, of course, in support of the finding of the trial court. While the expressed opinions of appellants' experts were contrary to the findings of the trial court, their testimony supported the findings.

The first expert called by the appellants was Robert Wilburn Canzoneri, a professor of English at Ohio State University. Canzoneri was asked what the dominant theme of relator's Exhibit A-1 was and he stated:

> "The dominant theme, as I see it, of this material, has to do with precisely what I was saying a moment ago, about the male, pictures of the nude male that is, there is an emphasis upon the genitalia area. That is, it seems to be designed to—for use by those who find the male genitals attractive."

Canzoneri gave his definition of the word "lust" as follows:

> "Well, my understanding of the concept of lust is that one is excited to or a rather overpowering urge toward, in terms of sex now, and toward sexual relationships of some sort with another person."

When asked if relator's Exhibit A-2 would appeal to a lustful or prurient interest in sex, Canzoneri responded:

> "I do not believe that the magazine—if I may answer that question? It might appeal to a lustful interest. I think it would have a secondary appeal to a lustful interest or a prurient interest, but the lustful and prurient interest in their active sense is directed towards another person.
>
> "I do not believe this magazine to be inciteful to prurient interest."

Canzoneri further clarified his understanding of the meaning of the word "prurient" when with respect to relator's Exhibits A-7, A-8, F-1, F-2, F-4 in R-26, he was asked whether they appealed to a prurient interest in homosexuals. He stated:

> "No, again I take the prurient interest to imply that there is some incitement to the release of sexual urges on some other human being, and, in fact, some

other non-consenting non-adult human being, I see no reason to consider that prurient."

In response to a question as to whether relator's Exhibit A-12 appeals to a prurient interest in sex, Canzoneri responded as follows:

"A. The opinion is that it does not appeal to the prurient interest, in that it does not seem to me to be designed to arouse anyone to any undue action in regards to sex.

"Q. But it may excite?

"A. It may excite, right. I would make that distinction between exciting and prurient interest because a prurient interest involves undue excitement, which I take it to mean there is some action reprehensible to society which would involve, in other words, society, rather than private individuals."

Canzoneri, in his testimony, clearly indicated that he was applying these definitions of prurient interest in expressing his opinions. In other words, Canzoneri's opinions were predicated upon the assumption that the dominant theme of material taken as a whole would not appeal to a prurient interest in sex unless such material would incite the reader to the release of his sexual urges on some other human being, in fact, some other non-consenting non-adult human being.

Stated in other words, Canzoneri's opinions were predicated upon the belief that no material appeals to a prurient interest in sex unless looking at such material results in some sexual action reprehensible to society involving some other person not a consenting adult. We do not understand the standard set forth by the deciding minority view of the United States Supreme Court to be so limited in scope.

In fact, this general type of argument was rejected in *Roth*. At page 489 of *Roth* (354 U.S. 476), it was stated by the United States Supreme Court that:

> "Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity."

At pages 485-486 of *Roth*, what is meant by appealing to prurient interest is set forth as follows:

> "It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the person stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: 'The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added.) In Alberts, the trial judge applied the test laid down in *People v. Wepplo*, 78 Cal.App.2d Supp. 959, 178 P.2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' (Emphasis added.)"

Furthermore, at pages 486-487 in *Roth*, it was stated:

> "It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court, in *Beauharnais v. Illinois, supra* [343 U. S.], at page 266:
>
> " 'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the

issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."

At this point, the Supreme Court set forth its definition of what is meant by appealing to prurient interest, in a footnote which reads as follows:

"20. *I.e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

"' * * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd * * * .'

"*Pruriency* is defined, in pertinent part, as follows:

"'* * * Quality of being prurient; lascivious desire or thought * * *'.

"See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U. S. 230, 242 [59 L. Ed. 552, 35 S. Ct. 387, 390], where this Court said as to motion pictures: '* * * They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* * * *.' (Emphasis added.)

"We preceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, Section 207.10 (2) (Tentative Draft No. 6, 1957), viz.:

"'* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excre-

> tion, and if it goes substantially beyond customary limits of candor in description or representation of such matters * * *.' See comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

We understand that material appeals to prurient interest when the material has a dominant tendency to excite lustful thoughts. In other words, we understand that it is *not necessary* that material *excite* lustful *acts* in order to be material appealing to prurient interest, but that a tendency to *excite* lustful *thoughts* (rather than acts) is sufficient. Stated in other words, we understand that the "appeal to a prurient interest in sex" part of the definition of obscenity is met where material appeals to a shameful or morbid interest in nudity or sex (*e.g.* voyeurism).

A review of Canzoneri's testimony indicates that the dominant theme of the material involved taken as a whole does appeal to a prurient interest in sex within the meaning of those words as set forth above. Canzoneri repeatedly testified that the material herein involved would be sexually exciting and is designed to enable a person looking at the material to enjoy a vicarious sexual relationship with the person or persons depicted in the pictures.

An example of the latter type of testimony is as follows:

> "* * * That is to say, someone who at least, say, a male homosexual, could take the magazine and look at these pictures and vicariously enjoy a sexual relationship with that person depicted.
>
> "They seem to me to be designed for those people who do not have the sexual opportunity but have the sexual desire for sexual relations with—in the case that we are talking about—with the male and also who have a curiosity about it."

The testimony of appellants' own witness Canzoneri can lead to but one conclusion, and that conclusion is that

the dominant theme of the material herein involved taken as a whole appeals to a prurient interest in sex. The first standard of the definition of obscenity established by the deciding-minority view is, therefore, met by the testimony of appellants' own expert witness.

Appellants' second expert witness was William Simon, a sociologist. With regard to the meaning of the word "prurient," Simon testified as follows:

> "Q (By Mr. Sturtz) Doctor, in the field of sociology, is there a commonly-accepted definition of the word 'prurient'?
>
> "A I'm afraid not.
>
> "Q Are there a number of definitions?
>
> "A Yes.
>
> "Q Would you state to the Court the various definitions?
>
> "A The simplest is probably simply lustful, but that frequently becomes circular, evoking lustful feelings. Very commonly the addition of the term 'morbid' or 'unhealthy interest in sex' is included as part of the definition.
>
> "Another aspect of the definition that turns out to be quite common is that it evoked feelings that are powerful, overwhelming, such that the individual has difficulty restraining his own behavior.
>
> "Perhaps another aspect is another implication that is commonly used among professions in that it suggests the evocation of the obsessive.
>
> "The Court: Of the what?
>
> "The Witness: The obsessive, being obsessive with some aspect of the sexual."

Other testimony indicated that Simon's testimony was predicated upon a definition of "prurient" that would involve the evoking of feelings that are powerful, over-

whelming, such that the individual has difficulty restraining his own behavior, and possibly including being obsessive with some aspect of the sexual. We also note the following testimony of the witness, Simon.

"Q (By Mr. Cohen) Could you define the term 'pornography'?

"A Yes. Again I am sure you know its initial usage, it refers to the language of and the study of the prostitute.

"In its more contemporary use, it refers to materials that deal in relative degrees of explicitness with sexual behavior, depiction of the sex act, and yes.

"Q Will you define the term 'hard core pornography'?

"A As it is commonly used, it really refers to the degree of explicitness with which such sexual activity is described or represented.

"Q Would you categorize these 18 books as a whole, or individually, as hard core pornography?

"A At best, medium soft.

"Q Please?

"A At best, medium soft. To me personally, in terms of distinctions I make, the line of 'hard', it is sexual activity, that bodies are touching other bodies in sexually purposeful ways with genital exposure and there may be some of that there, as I recall, but exceedingly limited.

"Q I refer you to Relator's Exhibit A-16. Would you define any of this, the pictures depicted here as hard core pornography?

"A No, because there is no genital contact.

"Q How about these pictures, Doctor?

"Mr. Sturtz: What exhibits are you referring to now?

"Q (By Mr. Cohen) I'm sorry, excuse me, Relator's Exhibit A-17. I will try to find the page number which is—I will show you the picture.

"Would you refer to those pictures as hard core pornography?

"A Well, the same grounds, the absence of congenital contact. I think part of the problem for me is that I don't know how much of this you have seen at the Institute. We had access to the Kinsey collection, and when I say 'hard core,' I have a series of images in my head that really talk about people explicitly doing sexual things to other people with a great deal of manifest genital involvement, and against that background, this really comes under the heading, you know, this would go to the middle area. * * *"

The testimony of appellants' witness Simon, taken as a whole, was to the effect that the material as to which he testified was pornography. However, it is apparent that he would classify only "hard core pornography" as appealing to a prurient interest in sex. The deciding-minority view of the United States Supreme Court has not limited to hard core pornography the type of material that may constitutionally be classified and regulated as being obscene.

It would appear to us that "medium core pornography" as well as "hard core pornography" constitutes material the dominant theme of which taken as a whole appeals to a prurient interest in sex. Accordingly, the testimony of appellants' witness Simon also supports the conclusion that the dominant theme of the material herein involved, taken as a whole, appeals to a prurient interest in sex.

Two of the exhibits present a slightly different problem than the others. These are Relator's Exhibits J-7 and R-9. Appellants' witness Canzoneri testified that these two

exhibits could be typified as being nudist-colony type magazines. He further testified that the sexual aspect is less dominant in these magazines than in the others. However, he further testified as follows: "It might again, despite the lesser emphasis on sex, it might still be sexually exciting to a degree." This testimony, together with other factors which we shall discuss later, permits a determination that the dominant theme of these magazines, also, taken as a whole, appeals to a prurient interest in sex. In other words, while these exhibits might not constitute material appealing to a prurient interest in sex in a different context, they do constitute such material under the context of this case.

Further indication of the nature of the material herein involved is found in the testimony of appellants' witness Canzoneri who stated that the material appeals to voyeurism; that is, an appeal to a person whose sexual desires are concentrated upon seing the sexual organs of others, or seeing sexual acts. In other words, a peeping tom-type of person. Appellants' witness Canzoneri testified in this regard as follows:

> "I don't think it tends to arouse lustful feelings. I think it tends to arouse feelings, yes, but not necessarily toward the other person. There is a great deal of voyeurism obviously on this publication and in all of these publications by the very nature.
>
> "The Witness: I think the purpose seems to be essentially that of many of the magazines that we have talked about. That is to say, that the aim is toward the fulfillment of interest and of people who do not have love partners, someone else with whom they may have sexual relations as the principal design.
>
> "It seems to me it would appeal very strongly to the Peeping Tom aspect or the voyeurism, even to the

designed, if you noticed, which are almost like half-closed windows."

It appears to us that where the dominant theme of material taken as a whole appeals to voyeurism, it must be concluded that the dominant theme of the material taken as a whole appeals to a prurient interest in sex. In other words, an appeal to voyeurism is an appeal to a prurient interest in sex.

We now turn to a consideration of the second element that must be present in order to constitutionally prohibit the distribution of literary material as being obscene. This, of course, is that the material must be patently offensive because it affronts contemporary community standards relating to the description or the representation of sexual matters. This element of the test of obscenity has been included in the deciding-minority view because of the obvious fact that there can be material the dominant theme of which taken as a whole appeals to a prurient interest in sex, but which is handled in such a way that it does not affront contemporary community standards relating to the description or representation of sexual matters: in other words, the appeal to a prurient interest in sex is described or represented in a manner acceptable to the community.

The testimony of appellants' witness Canzoneri also supplies this element of the test of obscenity. He repeatedly testified that the material herein involved offends contemporary community standards, whether on a local, state or national level, although there are a few localities in which this may not be true. An example of such testimony is as follows:

"Yes. I have an opinion. The opinion is that it is not patently offensive as long as it is not displayed publicly or put in the circumstances where the community cannot avoid it.

"If it were done so, then it would [be] offensive to a large portion of the community."

It is our understanding that the test of whether material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters is to be determined in the first instance from the nature of the material. It is clear that the testimony of appellants' witness Canzoneri was that the material herein involved is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. His testimony, however, is argumentative in that he contends that a person who never sees the material cannot be offended by it. However, the material herein involved was openly offered for sale to the adult public.

Appellants' witness Simon testified he did not feel the material affronted contemporary community standards because he had seen comparable material openly offered for sale. If we were to follow this reasoning, there could be no prohibition of obscene material as long as the sellers of the material openly offered it for sale. This, of course, is not the test. Whether or not material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters must be determined as best we can from the attitudes of the national public at large.

Appellants argue, in accordance with the testimony of their witnesses, Canzoneri and Simon, that the community cannot be offended by that which it cannot see. This argument, however, fails to recognize the true nature of this element of the deciding-minority view. It is not the contemporary community that must be affronted by the manner of description or representation of sexual matters. Rather, it is the contemporary community *standards* that

must be affronted by the manner of description or representation of sexual matters. Appellants and their witnesses would eliminate the word "standards" entirely from the element that the material is patently offensive because it affronts contemporary community *standards* relating to the description or representation of sexual matters. Matter may affront, or be offensive to, standards of the contemporary community even though only a few persons actually see or have an opportunity to see the material.

There can be no doubt that there are people who desire to make a profit by selling material of the nature herein involved. Likewise, there can be no doubt but that there are people who desire to purchase such material. The group of people desiring this type of material was referred to by appellants' witness Canzoneri as a "subculture." In other words, it is quite obvious that if there were not people desiring to profit from the sale of pornography and people desiring to purchase pornography, there would be no obscenity problem. However, the national community standards with regard to the description or representation of sexual matters cannot be determined by that minority or sub-culture desiring to sell, publish, purchase or observe such material. The only absolutely accurate way of determining national community standards would be by a plebiscite at which every elector was required to vote. This, of course, is impractical, if not impossible.

Under our system of government we rely upon elected representatives to reflect contemporary community standards in almost every area. Since the institution of this case, the Ohio Legislature enacted R. C. 2905.34, which gives some insight into what it believes constitutes contemporay community standards. This section reads as follows:

"As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

"(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

"(B) 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of any female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

"(C) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(D) 'Sexual conduct' means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical con-

tact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

"(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

"(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

R. C. 2905.34, of course, is not applicable to this case. However, it does give this court some insight as to what the state legislature has determined to be the type of material which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

The testimony of appellants' witness Canzoneri, as well as the material itself, clearly supports the trial judge's conclusion that the material herein involved is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

In determining this issue, courts must be careful not to permit a minority of people or the views of a given locality, be they more liberal (or permissive) or more conservative (or restrictive) than the national standard, to impose their will upon the national community at large. What we must be seeking is a general community standard of the nation as a whole, not the standard of the most permissive, with regard to the description or representation of sexual matters, or the standard of those most restrictive with regard to the description or representation of sexual matters.

While it would seem more in keeping with our federal system, to permit the determination of contemporary community standards relating to the description or representation of sexual matters to be determined upon a state-by-state basis rather than a national basis, we are required to apply (in keeping with the deciding-minority view) a national standard rather than a state standard.

There can be no doubt that there are communities, including some very large communities, in this country where apparently the contemporary community standards relating to the description or representation of sexual matters is most permissive and would permit almost any type of description or representation. On the other hand, there are communities whose contemporary community standards will prohibit almost all descriptions or representations of sexual matters. Neither of these constitute a national standard.

Far too often, it would appear to us, a national standard is not utilized but rather the standards of the most liberal or permissive communities are imposed upon the entire nation as a purported national standard.

In regard to standards, it is interesting to note that in *Roth* (354 U. S. 476), in footnote 30, at page 492, it is stated:

> "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system."

Also interesting in this regard is the statement of Mr. Justice Brennan in a dissenting opinion in *Kingsley Books, Inc. v. Brown* (1957), 354 U. S. 436, at page 448, as follows:

> "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

In other words, the contemporary community standards we are seeking to determine are those of the average person in the national community rather than those of the most sophisticated in sexual matters, or the most liberal or permissive in sexual matters, such as the expert witnesses who testified in this case.

Also, courts must refrain from applying their own personal standards relating to the description or representation of sexual matters. What we are seeking to apply is the contemporary standard of the average person in the nation, including both men and women, with respect to the representation or description of sexual matters. It is most difficult even if possible, to find or identify the hypothetical average person. Each of us like to think that our personal views are reflective of contemporary national community standards relating to the description or representation of sexual matters, as well as in all other areas. However, judges by the very nature of their experience are necessarily exposed to materials which the average person never sees and would avoid seeing if he could do so.

Perhaps the best answer to the determination of what material is obscene lies (as suggested by Mr. Justice Brennan in his opinion in *Roth* and dissenting opinion in *Kingsley*) with a determination by a jury under proper instruction of a court as to the standards to be applied. As Mr. Justice Brennan stated, a jury, representing a cross-section of the community, has a special aptitude for

reflecting the view of the average person as to what material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and we need not concern ourselves with the possibility that different juries may reach different conclusions as to the same material because this is one of the natural consequences of our jury system.

However, the United States Supreme Court has apparently not seen fit to adopt the view expressed by Mr. Justice Brennan which would limit the reversal of jury determinations to those situations where the evidence was such that reasonable men could only conclude that the material involved was not obscene, but has apparently made its own independent determination irrespective of a jury determination and irrespective of whether or not reasonable men might differ as to whether or not the material involved is obscene.

As stated above, in making a determination as to whether material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, courts must be careful not to impose as a national standard either the views or attitudes of the most permissive localities or segments of our society, nor those of the most restrictive localities or segments of our society. The material involved herein might not affront the contemporary community standards of the most permissive segments of society or localities of our country but most assuredly would affront the contemporary community standards of the most restrictive segments of society and localities of our country.

Based upon a review of the material itself and upon the testimony of appellants' own witnesses, we conclude that a determination that the material in this case is

patently offensive because it affronts national contemporary community standards relating to the description or representation of sexual matters is not only reasonable, justified, and supported by the evidence, but is required by the evidence if we are to apply national contemporary community standards rather than the standards of the most permissive segments of society or those of the most permissive localities within our nation.

Again, relator's exhibits J-7 and R-9 pose a slightly different problem. These are the magazines referred to as being nudist-colony type magazines. However, appellants' witness Canzoneri testified in this regard as follows:

> "My opinion is that these would offend a large portion of the community if they were enforced upon it in some way or made unavoidable, given an appearance unavoidably in the community but to the extent that they are excluded from the community at large and allowed to be seen only by those perhaps with specific interest in them, I can see no way in which there can be patent offense to the community."

This testimony requires a determination that these exhibits also constitute material which is patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters under the context of this case.

The third element required by the deciding-minority view (although not accepted by one of the justices who concurs in the other two elements) is that the material must be utterly without redeeming social value before it may be classified as obscene.

Each of appellants' witnesses testified that he found social value in this material. However, the social value that was found by these witnesses was predicated upon the appeal of the material to a prurient interest in sex. Stated

in other words, the appellants' experts testified that the material has social value because it is pornography, that is, because it does appeal to a prurient interest in sex.

Appellants' witness Canzoneri predicated his opinion of social value upon his conclusions that the material would afford an apportunity for a person to have vicarious sex experiences or satisfaction, would satisfy curiosity concerning the sexual organs of others, and would enable persons to compare their own sexual organs with those of others. Simon's testimony (appellants' witness) was of a similar nature.

We do not understand the deciding-minority view to be referring to this type of "social value" with respect to a determination of whether material is utterly without redeeming social value. Under the theory advanced by appellants through witnesses Canzoneri and Simon, all pornography, including hard core pornography would have redeeming social value, because it is pornography. We view the required test to be that the material must have social value for some purpose other than its use as pornography. "Social value" *because* the material is pornography does not meet the test; rather, "social value" *despite* the fact that the material has all the attributes of pornography is the required test.

Basically, the appellants' contention is that obscene material has redeeming social value because it fulfills the desires of persons desiring to look at obscenity who otherwise might seek other outlets for this desire. Such contention is inconsistent with the statement of the Supreme Court in *Roth* at page 484 which was as follows:

"But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be

restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 86 L. Ed. 1031 [62 S. Ct. 766, 769]:

> "'* * * There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene * * *. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.*' (Emphasis added.)"

Also, this entire line of reasoning put forth by appellants was expressly rejected in *Roth*, as set forth above.

There was no evidence which would justify a finding that the material in question in the context of this case has redeeming social value for any purpose other than its use as obscenity.

There is yet another reason why we must conclude that the material herein involved is utterly without redeeming social value. This material was sold as the stock in trade of the "sordid business of pandering"; that is, the business of purveying pictorial or graphic material openly advertised to appeal to the erotic interest of customers. This is the test of the *Ginzburg* case, *supra* (383 U. S. 463). It is true that there was no blatant advertising of the material. We conclude, however, that pandering includes the business of purveying pictorial or graphic matter by an appeal to the erotic interest of customers by subtle and sophisticated advertising as well as by blatant and explicit advertising.

It was stipulated that the windows of the bookstores herein involved had blackened windows and large signs stating: "You must be 21 years of age to enter." As stated by counsel for appellants in his oral argument, everyone knows the type of material that is sold in adult bookstores. There can be no doubt that the appellants utilized this type of open, but subtle and sophisticated, advertising to appeal to the erotic interest of their customers in order to sell the material herein involved. In other words, the evidence indicates that this material was exploited by appellants entirely on the basis of its appeal to prurient interest.

The Ohio Legislature has supplied us insight into a legislative determination of what constitutes redeeming social value by the enactment (subsequent to the institution of this case) of R. C. 2905.38(C). which reads as follows:

> "It is a defense to a charge brought under Section 2905.35 of the Revised Code, that the obscene material was disseminated or the obscene performance was presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuring bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance."

While there was testimony that a very small portion of the material herein involved might meet the standard of redeeming social value under a different context than that involved here, the evidence is clear that the material was exploited by appellants entirely on the basis of its appeal to prurient interest and was in no way sold or made available for any use which might constitute redeeming social value. Accordingly, under the context of this case, none of the material herein involved has any redeeming social value.

Essentially appellants' argument is that since they do not force anyone to purchase the type of material in this case, but, rather, sell the material only to those who wish to purchase it for its appeal to prurient interest in sex, the material should not be considered obscene. If this reasoning were adopted, there would be no material, including the worst of the hard core pornography, the sale of which could constitutionally be prohibited so long as the material was sold only to those who wished to purchase it because it was obscene.

Appellants, in effect, contend that the only constitutional limitation upon the sale of obscene material is that set forth in *Redrup, supra* (386 U. S. 767) at page 769 as follows:

> "* * * In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."

We do not understand this to be the only permissible limitation for if it were, the three standards set forth by the deciding-minority view would have no application whatsoever, but, rather, the only determination would be whether or not some individual's privacy was invaded by forcing the material upon him. Rather, the invasion of privacy permits the prohibition of material which would not be considered obscene under the deciding-minority view tests of obscenity.

There is another aspect with regard to this type of material that makes it a matter of legislative concern, similar to the aspect commented upon in *Mishkin, supra* (383 U. S. 502) with regard to printed material. There is inherent in the publication of such material exploitation of the persons posing for the pictures including, in some instances, minors.

It is highly improbable that some of the material herein involved could be prepared without acts of prostitution or sodomy. Inherent in the publication of pictorial pornography is the commission of acts, directly or indirectly, which are abhorrent to our national society, and are prohibited by the laws of almost all jurisdictions. This constitutes yet an additional reason why pictorial obscenity is not within the constitutional protections of freedom of speech or the press. However, we do not predicate any portion of our decision upon this aspect, or basis. Rather, this decision is predicated entirely upon a determination that, with respect to the material herein involved, the three elements set forth by the deciding-minority view of the United States Supreme Court are present and they coalesce.

In fact, the material involved here is all obscene, under the context of this case, by whatever definition of obscenity is used, with the possible exception of the standard of one of the justices of the United States Supreme Court who feels that only "hard core pornography" can be considered obscene within constitutional limitations. A portion of the material herein involved would even meet the test of "hard core pornography."

Appellants further contend that since an individual may have a right to possess obscene material in the privacy of his own home (*Stanley v. Georgia* (1969), 394 U. S. 557, 22 L. Ed. 2d 542), the appellants have the right to sell the material herein involved in order to make it available to those individuals who desire to possess obscenity in the privacy of their homes. In *Stanley*, however, the United States Supreme Court expressly stated that *Roth* and the cases following are not impaired by the decision in *Stanley*.

Furthermore, such argument ignores *Ginzburg, supra*. In effect, the appellants' argument is that obscene mate-

rials may be sold so long as there is pandering: that is, so long as there is an advertised appeal to the erotic interest of the potential customer. We reject this argument of appellants because it is inconsistent with *Roth*, *Ginzburg*, and *Stanley*.

In summary, based upon a review of the material itself and the evidence (especially the testimony of appellants' own expert witnesses by which the appellants are bound), we determine that the three elements of obscenity as set forth by the deciding-minority view coalesce with regard to the material herein involved under the context of this case.

We find that the dominant theme of each piece of material herein involved, taken as a whole, appeals to a prurient interest in sex. The appeal to voyeurism is possibly the strongest appeal of all of this material and is its dominant theme. In other words, the dominant theme of this material is an appeal to the peeping-tom type of person who desires to look at this type of pictorial representation in order to enjoy becoming sexually excited and to enjoy the creation, by the material, of lustful thoughts and feelings, and, perhaps, vicarious sexual gratification. While some of the material may appeal to the heterosexual, and some may be designed to appeal to sadomasochists or fetishists or homosexuals, the dominant theme under the context of this case of each of the exhibits herein involved taken as a whole, is an appeal to a prurient interest in sex.

The material herein involved is patently offensive because it affronts national contemporary community standards relating to the description or representation of sexual matters. This is clearly established by the testimony of appellants' own witnesses by which the appellants are bound.

The material herein involved is utterly without redeeming social value. Appellants' witnesses testified that

the social value of the material resulted from its use as obscenity. We do not understand this to constitute redeeming social value. Furthermore, the evidence further indicates that the appellants are engaged in pandering; that is the exploitation of the material for its appeal to a prurient interest in sex.

Since all three elements of the deciding-minority view are present and coalesce with regard to the material herein involved, we conclude that such material is obscene within the meaning of the statutory law and constitutes obscenity of a type not within the ambit of constitutionally protected freedom of speech or press.

For the foregoing reasons, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TROOP, P. J., and STRAUSBAUGH, J., concur.

APPENDIX H

Order of Supreme Court of Ohio Dismissing Appeal

(September 15, 1971)

Nos. 71-221 and 71-231

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio,
City of Columbus.

State of Ohio, ex rel. M. E. Sensenbrenner, Mayor,
Appellee,

vs.

Adult Book Store et al.,
Appellants.

Appeal from the Court of Appeals for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

(Certificate of Clerk omitted in printing)

APPENDIX I

Order Remanding Case to Supreme Court of Ohio

(Filed June 25, 1973)

No. 71-773

SUPREME COURT OF THE UNITED STATES

ADULT BOOK STORE *et al.*,

Petitioners,

vs.

M. E. SENSENBRENNER, MAYOR,

The petition for a writ of certiorari is granted, the judgment(s) is vacated and the case remanded for further consideration in light of *Miller v. California*, __U.S.__ (1973); *Paris Adult Theatre I v. Slaton*, __U.S.__ (1973); *Kaplan v. California*, __U.S.__ (1973); *United States v. 12 200-Ft. Reels of Super 8 mm. Film*, __U.S.__ (1973); *United States v. Orito*, __U.S.__ (1973); *Heller v. New York*, __U.S.__ (1973); *Roaden v. Kentucky*, __U.S.__ (1973); and *Alexander v. Virginia*, __U.S.__ (1973). Mr. Justice Douglas would grant the petition and reverse the judgment(s). See *Miller v. California, ante* (dissenting opinion of Douglas, J.). Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, would grant the petition, vacate the judgment(s) and remand the case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I v. Slaton, ante.* See *Miller v. California, ante* (dissenting opinion of Brennan, J.).

APPENDIX J

Opinion of Supreme Court of Ohio on Remand

(Nos. 71-221 and 71-231—Decided September 26, 1973.)

THE STATE, EX REL. SENSENBRENNER, MAYOR, APPELLEE, *v.* ADULT BOOK STORE ET AL., APPELLANTS. (Two cases.)

APPEALS from the Court of Appeals for Franklin County.

ON REMAND from the Supreme Court of the United States.

In these causes relator, appellee herein, filed an action in the Court of Common Pleas to enjoin the sale and distribution of certain magazines and books by appellants on the ground that they were obscene.

The Court of Common Pleas granted relator's amended petition for a permanent injunction and the Court of Appeals affirmed the judgment.

Appellants' motions to certify the record were overruled by this court on September 15, 1971.

Upon appeal to the Supreme Court of the United States, that court vacated this court's judgments and remanded the causes for further consideration in light of *Miller* v. *California* (1973), 37 L. Ed. 2d 419; *Paris Adult Theatre I* v. *Slaton* (1973), 37 L. Ed. 2d 446; *Kaplan* v. *California* (1973), 37 L. Ed. 2d 492; *United States* v. *12 200-Ft. Reels of Super 8mm. Film* (1937), 37 L. Ed. 2d 500; *United States* v. *Orito* (1973), 37 L. Ed. 2d 513; *Heller* v. *New York* (1973), 37 L. Ed.2d 745; *Roaden* v. *Kentucky* (1973), 37 L. Ed. 2d 757; and *Alexander* v. *Virginia*, (1973), 37 L. Ed. 2d 993.

Upon remand, the causes are now before this court pursuant to appellants' motions to certify the record.

Per Curiam. In *State, ex rel. Keating*, v. *Vixen, ante*, 215, this court held that R. C. 2905.34 and 2905.35 comport

with the standards for determining obscenity enunciated in *Miller* v. *California* (1973), 37 L. Ed. 2d 419. Those statutes were applied in the initial *Vixen* opinion, reported in 27 Ohio St. 2d 278, in determining whether the film in question was obscene.

In like fashion those statutes may be used in the instant appeals to determine whether the materials in question are obscene.

It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in *Miller* and the provisions of R. C. 2905.34 as guides for determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance.

Inasmuch as "* * * we have authority to render such judgment as the lower court would now be required to render, if the cause were remanded" (*State, ex rel. Keating,* v. *Vixen* [1971], 27 Ohio St. 2d 278), we allow the motions to certify the record and affirm the judgment of the Court of Appeals.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX K

Order of Supreme Court of Ohio on Remand

(September 26, 1973)

Nos. 71-221 and 71-231

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

State of Ohio, ex rel. M. E. Sensenbrenner, Mayor,
Appellee,

vs.

Adult Book Store *et al.*,
Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

THEREUPON, this cause came on for further consideration on the opinion and order of The Supreme Court of the United States. On consideration thereof, it is ordered and adjudged that the judgment of this Court dismissing the appeals as of right and overruling the motions to certify the record be and the same hereby are vacated and set aside and it is ordered and adjudged that the motions to certify the record be and the same hereby are allowed and the judgment of the Court of Appeals be, and the same hereby is, affirmed for the reasons set forth in the opinion rendered herein.

It is ordered and adjudged also that the appellee recover from the appellant costs herein expended and that a mandate issue to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

APPENDIX L

Constitution and Statutes

CONSTITUTION OF THE UNITED STATES

(Amendment I)

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§ 2905.34. Definitions.

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture

film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

§ 2905.35. Production or dissemination of obscene material or performances.

No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

§ 2905.37. Enjoining sale or distribution of obscene material.

(A) Where it appears that section 2903.14 or 2905.35 of the Revised Code is being or is about to be violated, the county prosecutor or chief executive or legal officer of a

municipal corporation in the jurisdiction where such violation is taking place or is about to take place, may maintain an action in the common pleas court to enjoin the sale, distribution, or presentation of the obscene material or performance, or enjoin the sale, distribution, or presentation to minors under eighteen of the material or performance harmful to minors.

(B) The defendant is entitled to trial on the merits within five days after joinder to the issues, and the court shall render its decision within not more than five days after conclusion of the trial. If the court finds that such material or performance is obscene, it shall enjoin the sale, distribution, or presentation of such material or performance, if the court finds that such material or performance is harmful to minors, it shall enjoin the sale, distribution, or presentation of such material or performance to minors under eighteen.

(C) Any person who does not reside in this state or any corporation not admitted to do business in this state who causes material to be sent into this state for ultimate sale or distribution within this state, thereby consents to be sued pursuant to this section, with service of process to be made upon the secretary of state, who is deemed to be agent of such person or corporation for this purpose. Such process shall be served by the office to whom it is directed or by the sheriff of Franklin county upon the secretary of state by leaving a true copy thereof at his office at least fifteen days before the return day of such process, and by sending a true copy to the defendant by registered mail, return receipt requested, at his address appearing on the material or at his last known address. The return receipt shall be attached to and made a part of the return of service.

§ 2905.343. Enjoining sale or distribution of obscene matter. [Repealed; Eff. 9-15-70].

The court of common pleas has jurisdiction to enjoin the sale and distribution of obscene prints and articles, as specified:

(A) The prosecuting attorney, the chief executive officer of a municipal corporation, or the chief legal officer of a municipal corporation, in which a person, firm, or corporation sells or offers for sale or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story book, writing, paper, picture, photograph, image, or any written or printed matter of an indecent character, which said prosecuting attorney or officer believes to be obscene, lewd, lascivious, filthy, indecent, may maintain an action for an injunction against such person, firm, or corporation in the common pleas court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of such article or articles.

(B) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. If on the trial of the issues the court determines that the article is obscene the court shall enter a judgment or decree enjoining the sale or further sale or the distribution or the further distribution or the acquisition or possession of such article. Upon application of the plaintiff for a temporary restraining order pending the trial of the issues the court may forthwith restrain the defendant from selling or offering the same for sale until one day after joinder of issue.

No bond shall be required to make said restraining order effective.

(C) In the event that a final order or judgment of injunction be entered in favor of the petitoner, such final order shall contain a provision directing the person, firm, or corporation to surrender to the sheriff of the county any of the matter described in division (A) of this section, and such sheriff shall be directed to seize and destroy the same.

(D) Every person, firm, or corporation who sells, distributes or acquires possession with intent to sell or distribute any of the matter referred to in (A) of this section and described in sections 2903.10 and 2903.11, or sections 2905.32 to 2905.41, inclusive, of the Revised Code, after service upon him of a summons and complaint in any action brought by such officer of any county, city, village, or other political subdivision pursuant to this section is chargeable with knowledge of the contents thereof.

(E) Any corporation not admitted to do business in this state which publishes and causes printed material to be sent into this state for ultimate sale at retail in this state thereby consents that it may be sued in any proceedings commenced pursuant to this section and that service may be made upon it by registered mail directed to the address of such corporation appearing on the printed material.

§ 2905.34. Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes. (G.C. § 13035) [Repealed, eff. 9-15-70].

No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print,

picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.